made."[29] A reviewing court "will not supply the basis for the agency's action, but instead rely on the reasons advanced by the agency in support of the action."[30] The United States Supreme Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner."[31] "[A]n agency action accompanied by an inadequate explanation constitutes arbitrary and capricious conduct."[32]

29. The Commission's adoption of the 45-day access requirement constitutes arbitrary and capricious conduct because, quite simply, the Commission failed to provide any basis -- reasoned or otherwise -- for this requirement.[33] Nowhere in the Commission's First R&O does it address or reasonably rationalize how it devised the 45-day access requirement. The Commission's failure to address this requirement in its Notice and in the First R&O runs contrary to the APA. That statute requires the agency to supply a reasoned basis for why it chose

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[29] City of Brookings Mu. Tel Co. v. Federal Communications Comm'n, 822 F.2d 1153, 1165 (D.C. Cir. 1987) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

[30] Cincinnati Bell Tel. Co. v. Federal Communications Comm'n, 69 F.3d 752, 758 (6th Cir. 1995) (citation omitted).

[31] Motor Vehicle Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 48-49 (1983) (citing Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade, 412 U.S. 397, 416 (1967)).

[32] FEC v. Rose, 806 F.2d 1081, 1088 (D.C. Cir. 1986).

[33] See 806 F.2d at 1088.

to adopt a certain rule or rules.[34/] The lack of a reasoned basis for its decision constitutes arbitrary and capricious decision making.[35/]

30. Moreover, the Commission's 45-day access requirement is not a "logical outgrowth" out of its original NPRM.[36/] The focus of the "logical outgrowth" test is "whether . . . [the party] . . . should have anticipated that such a requirement might be imposed."[37/] In this instance, parties could not have anticipated that a 45-day access requirement would be imposed, as the Commission did not even address or discuss this issue in its NPRM. While FPL recognizes that an agency's notice need not identify every precise proposal which the agency may finally adopt, the notice must specify the terms or substance of the contemplated regulation.[38/] In adopting the 45-day access rule, the Commission failed to discuss this contemplated rule anywhere. Had the Commission even remotely addressed the 45-day access

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[34/] Schurz Communications, Inc. v. Federal Communications Comm'n, 982 F.2d 1043, 1049 (7th Cir. 1994).

[35/] Cincinnati Bell Tel. Co. v. Federal Communications Comm'n, 69 F.3d 752 (6th Cir. 1995).

[36/] See United Steelworkers of America v. Marshall, 647 F.2d 1189, 1221 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981).

[37/] Small Refiner Lead Phase-Down Task Force v. United States EPA, 705 F.2d 506, 549 (D.C. Cir. 1983).

[38/] American Medical Ass'n v. United States, 887 F.2d 760, 767 (7th Cir. 1989).

requirement in its NPRM, parties would have had an opportunity to respond to the proposal.[39/]

31. Notwithstanding the procedural problem, to the extent the FCC intended to require utilities to grant physical access to infrastructure within 45 days, that requirement is overly burdensome and unreasonable. Forty-five days in which to grant physical access to a utility's infrastructure provides utilities with insufficient time to conduct the requisite studies involved in granting access to an outside party, for example, studies related to issues of capacity, safety, reliability and generally applicable engineering purposes.

32. FPL anticipates that simply addressing a request for access to its infrastructure is, at minimum, a six- to eight-week process. The process of establishing potential routes, evaluating whether the requested route is feasible, creating a final route map, and performing the necessary safety and

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[39/] In short, the Commission failed to provide parties with adequate notice "to afford interested parties a reasonable opportunity to participate in the rule making process." Florida Power & Light Co. v. United States, 846 F.2d 765, 777 (D.C. Cir. 1988). "This requirement serves both (1) 'to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies'; and (2) to assure that the 'agency will have before it the facts and information relevant to a particular administrative problem.'" MCI Telecommunications Corp. v. Federal Communications Comm'n, 57 F.3d 1136, 1141 (D.C. Cir. 1995) (citing National Ass'n of Home Health Agencies v. Schweiker, 690 F.2d 932, 949 (D.C. Cir. 1982)).

engineering studies on a case-by-case basis, because of the large numbers of poles involved, may be both infeasible and unreasonable to accomplish with the 45-day time frame arbitrarily established by the FCC. Thus, the 45-day access requirement should be reconsidered not only because it was promulgated in violation of the APA but also because it is technically and administratively burdensome.

33. Even if the Commission determines to extend the 45-day requirement, the time period should not begin to run until the requestors have provided full and complete documentation to the utility of the effect of its request, including, windloading[40/] calculations, cable size, tensions, attachment locations, guy wires, anchors and line anchors. All of this information is essential for proper evaluation of such a request for access. Moreover, the Commission must make clear that the cost of accumulating this information will be placed on the entity that will benefit from the attachment.

[40/] If transmission poles are included in the FCC's access requirements, FPL's transmission department would perform the windloading calculations due to the critical importance of these calculations to the integrity of the transmission system. FPL would charge the attachee for the costs of these calculations.

B. The Conclusion that Any Type of Equipment Can Be Placed on a Utility's Infrastructure Is Arbitrary and Capricious

34. The FCC erroneously failed to limit the type of telecommunications equipment that may be attached under mandatory access to poles, ducts, conduits or rights-of-way. Specifically, the FCC must clarify that radio antennas, satellite earth stations, microwave dishes and other wireless equipment (collectively "wireless equipment") are not covered by Section 224(f).[41/]

35. The Pole Attachments Act, as enacted in 1978, was intended to encompass "pole attachments" by cable operators to poles, ducts, conduits and rights-of-way of utilities used, in whole or in part, for wire communications. While the 1996 Act expanded the scope of the statute to allow pole attachments by "telecommunications carriers" as well as cable operators, Congress did not make any further changes to the definition of "pole attachment." The placement of wireless equipment on poles, ducts, conduits or rights-of-way raises a number of unique issues that were not intended to be covered by the Pole Attachments Act.

36. Historically, the term "pole attachments" has referred to the stringing of coaxial cable along a utility's distribution

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41/ See Reply Comments of Infrastructure Owners at ¶ 14.

pole system.[42/] Wireless equipment has not been considered a "pole attachment." Indeed, where it has been placed on a utility's infrastructure at all, the wireless equipment has generally been sited on communications towers or transmission facilities, which are not covered under Section 224(f) as set forth above. Antennas, for example, require siting on a place higher than the typical distribution pole. Thus, in practical terms, utility poles, ducts, conduits or rights-of-way are unsuited for the placement of wireless equipment.

37. Beyond the definition of "pole attachments," the definition of "utility" establishes that the statute is limited to wire facilities and equipment. Under Section 224(f), both as originally enacted and today, Congress defined a utility as:

> any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or other rights-of-way used, in whole or in part, for <u>any wire communications</u>....[43/]

The use of "wire communications" was in fact retained from the previous definition of utility; Congress considered such language and deliberately decided not to change it. Since a "utility" is

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[42/] <u>See, e.g., In the matter of Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming</u>, First Report, 9 F.C.C.R. 7442, 7555 (1994). "Many cable operators lease space on utility poles in order to string wires and deliver programming. The contract between the cable operator and the owner of the pole is known as a 'pole attachment agreement.'"

[43/] 47 U.S.C. § 224(a)(1) (emphasis added).

a person utilizing poles, ducts, conduits or rights-of-way "for any wire communication" the access provision only applies to such uses. The mandatory access of Section 224(f) is, accordingly, limited to instances where wire communications are at issue. If this were not the case, Congress, knowing of the historical interpretation of the Act as applicable only to wire communications, would have amended the statutory language to reflect an intent that the Act also apply to wireless uses.

38. The Pole Attachments Act does not cover the attachment of wireless equipment to utilities' poles, ducts, conduits or rights-of-way. There is nothing in the express language of the statute, its legislative history or the case law to support a contrary view.

C. The Commission's Determination that a Utility May Not Restrict Who Will Work in Proximity to Its Electric Lines Is Arbitrary and Capricious and Illustrates a Fundamental Misunderstanding of the Danger Associated With Such Work

39. In addressing the question of whether a utility can impose limitations on the class of workers that work in proximity to a utility's facility, the Commission determined that:

> [a] utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility's own workers, but the party seeking access will be able to use any individual workers who meet these criteria. Allowing a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications providers and cable

operators and would inevitably lead to disputes over rates to be paid to the workers.

In its effort to apply a uniform rule to all utilities and all types of infrastructure, the Commission has adopted a rule which ignores the fundamental differences between working in proximity to electric facilities and working in proximity to other telecommunication facilities.

40. Electric facilities are used for high voltage transmission and, thus, anyone who works in close proximity to such facilities is in imminent danger. To minimize the risk of harm to persons and property, utilities tap a finite pool of highly experienced employees to perform any required work on such facilities. The level of experience required of the employee strictly depends on the grade of danger associated with the work. For example, any employee who works in proximity to electric facilities in conduits may be required to have a minimum of ten years of experience. Personnel possessing the requisite skill and experience are in short supply; moreover, because of the hazards involved, a utility is understandably reluctant to allow a person with unknown skills to perform highly dangerous work.

41. In complete disregard of the serious danger and concomitant liability associated with working in proximity to electric facilities, the Commission has fashioned a rule that simply is unworkable on a practical level. First, even if minimum qualifications are established, the utility has no way to

confirm such qualifications. This, in turn, raises liability concerns. Second, regardless of any broad form indemnity provision, electric utilities simply cannot sufficiently protect themselves from personal injury litigation and the high costs associated with an electrical outage when accidents occur as a result of work being performed by inadequately skilled or trained workers. Because of this enormous financial exposure, it is incongruous that the Commission can first mandate access to this dangerous facility, and then eliminate the electric utility's ability to minimize any exposure this mandatory access may cause. The Commission's rule on worker access to utility infrastructure is unsupported by the nondiscriminatory access provision and, thus, is capricious.

D. The Commission Improperly Incorporated Section 224(i) into Its Section 224(h) Analysis on Cost-Sharing Issues

42. In the First R&O, the Commission extensively discussed modification costs in its analysis of cost-sharing under Section 224(h). As a result, the Commission adopted a rule addressing modification costs under the pretense of its rule making to implement Section 224(h).[44/]

[44/] That rule paraphrases or adopts verbatim the language of Section 224(i). Section 224(i) states:

> An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity ... .

(continued...)

43. A discussion of modification or alteration costs may be appropriate in the context of a rulemaking to implement Section 224(i) of the Pole Attachments Act. However, Section 224(i) is not a subject of this proceeding.[45/]

44. Clearly, the Commission has misread Section 224(h). Section 224(h) states:

> Any entity that adds to or modifies its existing attachment after such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right of way accessible.[46/]

45. Accessibility costs are incurred before modification even begins. Congress did not intend for other costs to be governed by Section 224(h). Section 224(h) says nothing about modification, rearrangement, replacement, or make-ready costs. Yet, the Commission's new rule, 47 C.F.R. § 1.1416, governs such costs. Because the Commission has improperly adopted rules

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[44/](...continued)

The Commission's rule, in turn, reads:

> ... a party with a preexisting attachment to a pole, conduct, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment of the modification of an existing attachment sought by another party. 47 C.F.R. § 1.1416.

[45/] First R&O, ¶ 1201, n.2952 "Note that section 224(i) was not the subject of the Notice."

[46/] 47 U.S.C. § 224(h) (emphasis added).

implementing Section 224(i) under the guise of Section 224(h), it must strike 47 C.F.R. § 1.1416 as beyond the scope of this rule making. Any rule implementing Section 224(h) must address only the costs of accessibility as specifically set forth by Congress in express language of that statutory provision.

46. Notwithstanding the procedural infirmity discussed above, the Commission's rules pertaining to accessibility costs must be clear that such costs are properly within the scope of negotiated agreements between utilities and companies seeking access. For example, accessibility costs must cover a utility's expenses related to the review of requests to attach. Otherwise, the utility is saddled with expenses related to requests that are later abandoned by the requesting party.

IV. The FCC's Interpretation Is Impermissible Because It Violates Congressional Intent

A. The Requirement for Uniform Application of the Rates, Terms and Conditions of Access Is Contrary to Law Because It Fails to Give Effect to the Statutory Requirement of Voluntary Negotiations

47. Section 224(e)(1) of the 1996 Act provides for a voluntary negotiation phase where a utility and a telecommunications carrier have the opportunity to negotiate and enter into a binding agreement. Specifically, Section 224(e)(1) states that the Commission will prescribe regulations:

> to govern the charges for pole attachments used by telecommunications carriers to provide

> telecommunications services, when the parties fail to resolve a dispute over such charges."[47]

48. Clearly, Congress intended for utilities and requesting telecommunications carriers to voluntarily enter into binding, contractual arrangements. Congressional intent encouraging negotiated agreements, including negotiated rates, is clearly evidenced by the Conference Committee's report, which states:

> The conference agreement amends section 224 of the Communications Act by adding new subsection (e)(1) to allow parties to negotiate the rates, terms, and conditions for attaching to poles, ducts, conduits, and rights-of-way owned or controlled by utilities. . .[48]

49. The concept behind negotiated agreements also comports with the public policies underlying the 1996 Act. The 1996 Act is intended "to provide for a pro-competitive, deregulatory national policy framework . . . by opening all telecommunications markets to competition."[49] Even where Congress recognized that some regulation might be warranted during the transition period from a regulated to a deregulated market place, it put in place procedures to reduce or eliminate that regulation where possible.[50]

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[47] 47 U.S.C. § 224(e)(1) (emphasis added).

[48] H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 207 (1996) (emphasis added).

[49] H.R. Conf. Rep. No. 458, 104 Cong., 2d Sess. 113 (1996).

[50] See, e.g., 47 U.S.C. § 252(a)(1) (providing that an incumbent local exchange carrier and a party requesting interconnection may enter into a binding agreement without regard to the interconnection standards set forth in Sections 251(b) and (c)).

50. In its First R&O, the Commission recognized the deregulatory, pro-competition approach of the 1996 Act. For example, the Commission declared that it would enact rules and guidelines that are intended to "facilitate the negotiation and mutual performance of fair, pro-competitive access agreements." First R&O, at 1143.

51. Conflicting with Congress's notion of voluntary negotiated agreements, however, the Commission enacted a specific "rule" in its First R&O that states:

> . . . where access is mandated, the rates, terms and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access. Except as specifically provided herein, the utility must charge all parties an attachment rate that does not exceed the maximum amount permitted by formula we have devised for such use . . .[51/]

52. Interpreted as a separate section, this Commission rule obviates the need for voluntarily negotiated agreements, which is contrary to what Congress intended in promulgating Section 224(e)(1) of the 1996 Act. If rates, terms and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access, there is no reason to enter into voluntary negotiations with other carriers.

51/ First R&O, ¶ 1156 (emphasis added).

53. In interpreting a statute, agencies and courts must look to a construction that gives effect to the statute as a whole.[52/] A construction that renders meaningless one or more provisions of the statute must be avoided, as " . . . it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . and the objects and policy of the law . . ." [53/]

54. In the present context, the Commission's decision that the statute requires uniform application of rates, terms and conditions for access ignores the 1996 Act's statutory provision allowing parties to negotiate their own terms. For this reason, the agency must correct this clear error by adopting regulations that will enable parties to negotiate the rates, terms and conditions of their agreements.

B. The FCC's Finding that the Pole Attachments Act Applies to Transmission Facilities Is Contrary to the Plain Meaning of the Statute and Congressional Intent

55. In the First R&O, the Commission suggested that transmission facilities might be covered by the Pole Attachments Act and declined to make a blanket determination that Congress did not intend to include transmission facilities under Section

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[52/] United States v. PUC of District of Columbia et al., 151 F.2d 609, 613 (1945).

[53/] Stafford v. Briggs, 444 U.S. 527, 535 (1980) (quoting Brown v. Duchesne, 60 U.S. (19 How.) 183, 194 (1857)) (emphasis added).

224(f)(1).[54] That suggestion contradicts the plain meaning of the statute and the legislative history of the Pole Attachments Act, as amended, both of which clearly establish that Congress did not intend for transmission facilities to be included under Section 224(f). Had Congress intended otherwise, it would have specifically included "transmission facilities" in the language it used.

56. The meaning of a statute must first be sought in the language in which the Act is framed.[55] If that language is plain, then there is no room for alternative construction.[56] Moreover, the expression of a discrete group of items creates an inference that all omissions are meant to be excluded.[57]

57. Based on its plain language, the Pole Attachments Act encompasses only "poles, ducts, conduits, and rights-of-way."[58] Congress did not name, and thus must not have intended to

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[54] First R&O, ¶ 1184.

[55] Wolverine Power Co. v. FERC, 963 F.2d 446, 449-450 (D.C. Cir. 1992).

[56] Id.

[57] See Nat'l Resources Defense Council v. Reilly, Adm'r, EPA and EPA, 976 F.2d 36, 41 (D.C. Cir. 1992).

[58] Additionally, words not defined in a statute should be given their ordinary or common meaning. United States v. PUC of District of Columbia et al., 151 F.2d 609, 613 (D.C. Cir. 1945). The Infrastructure Owners are unaware of any instance in which Congress has included transmission facilities in the definition of poles, ducts, conduits and rights-of-way.

include, transmission facilities in addressing the scope of the infrastructure covered by Section 224(f).

58. The 1996 Act's amendments did not change the type of utility infrastructure covered by the original 1978 Act. For this reason, it is appropriate to look not only to the 1996 Act's legislative history to glean Congressional intent, but also to that of the earlier statute.[59/] For example, the legislative history of the 1978 Pole Attachments Act notes that the FCC's jurisdiction over pole attachments is triggered only where space on a utility pole has been designated and is actually being used for communications services by wire or cable.[60/] Thus, transmission poles, which are not used for stringing communications wires, would not be subject to FCC jurisdiction and logically are not within the scope of the Act.[61/]

59. Moreover, in its Reconsideration Memorandum Opinion and Order revising the 1978 rate formula, the Commission stated that "[t]he cable television industry leases space on existing distribution poles owned by electric utilities and telephone

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[59/] See generally, Blum v. Stenson, 465 U.S. 886, 896 (1984).

[60/] S. Rep. No. 95-580 at 15, reprinted in 1978 U.S.C.C.A.N. 109, 123.

[61/] Id. at 123-124.

companies to attach its coaxial cable and related equipment."[62/] Additionally, in at least two other decisions addressing FCC rate calculations, the Commission states that "towers and extremely tall poles" are pole plants not normally used for attachments.[63/] These references are clear examples of the Commission's interpretation that, as the plain language of the statute suggests, the Pole Attachments Act does not apply to transmission towers and other transmission facilities. This interpretation is consistent with the prevailing understanding within the electric utility industry that the term "poles" means distribution poles only.

C. The FCC Violated the Plain Language of the Pole Attachments Act to the Extent It Concluded that the Use of any Single Piece of Infrastructure for Wire Communications Triggers Access to All Other Infrastructure

60. In its First R&O, the FCC discusses the issue of when the mandatory access provision of Section 224(f) is triggered. According to the Commission, the definition of "utility" addresses that issue.[64/] A "utility" -- a local exchange

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[62/] See In the Matter of Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 4 F.C.C.R. 468 (1989) (emphasis added).

[63/] In the Matter of Capital Cities Cable, Inc. v. Mountain States Tel. and Tel. Co., 56 Rad. Reg. 2d (P&F) 393, 399 n.10 (1984); In the Matter of Logan Cablevision, Inc. v. Chesapeake and Potomac Tel. Co. of West Virginia, 1984 FCC Lexis 2400 (1984).

[64/] First R&O, ¶s 1171-1174.

carrier or an electric, gas, water, steam or other public utility who owns or controls poles, ducts, conduits or rights-of-way -- must grant access if those poles, ducts, conduits or rights-of-way, are "used, in whole or in part, for wire communications."[65/] The question then becomes the proper interpretation of the phrase "used, in whole or in part, for wire communications." The Commission made three critical findings in this regard.

61. First, the Commission determined that the plain language of the statute establishes that a "utility" may deny access to its facilities if the utility has refused to permit any wire communications use of its facilities and rights-of-way.[66/] Second, the Commission found that "the use of any utility pole, duct, conduit or right-of-way for wire communications triggers access to all poles, ducts, conduits and rights-of-way owned or controlled by the utility, including those that are not currently used for wire communications."[67/] Third, the Commission found that the use of poles, ducts, conduit and rights-of-way for a utility's private internal communications constitute "wire communications," thereby triggering the access requirement.[68/] These findings violate the Congressional intent of the Pole

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[65/] Id., ¶ 1172.

[66/] First R&O, ¶ 1173.

[67/] Id.

[68/] Id., ¶ 1174.

Attachments Act and, for this reason, are impermissible constructions of the statute.

62. The Commission relies on the use of the phrase "in whole or in part" to support its conclusions. According to the Commission, that phrase demonstrates that Congress did not intend for a utility to be able to restrict access to the exact path used by the utility for wire communication.[69] FPL disagrees.

63. Congress has addressed the precise question of whether the phrase "in whole or in part" refers to (1) the use of an individual pole, in whole or in part, or (2) to the use of a utility's entire electric distribution network, in whole or in part, for wire communications. Although not addressed in the legislative history of the 1996 Act's amendments, Congress spoke to the question in 1977, in enacting the original Pole Attachments Act.[70] There, Congress indicated two conditions precedent to Commission jurisdiction over pole attachments:

> (1) That communications space be designated on the pole; and,

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[69] Id., ¶ 1173.

[70] Because the language in question was not amended by the 1996 Act's amendments, the earlier legislative history is relevant in determining the intent of Congress.

(2) That a CATV system use the communications space, either alone or in conjunction with another communications entity.[71/]

64. This language establishes that Congress intended the Commission's jurisdiction to be invoked on a pole-by-pole basis, not a system-wide basis. Plainly then, the "used, in whole or in part" language refers to the use of a single pole.

65. This interpretation of the statutory language is consistent with the underlying nature of access requests. Those requests are made on a pole-by-pole basis, depending on the needs of the requesting party. Similarly, the decision as to whether access may be granted consistent with existing capacity, safety, reliability and generally applicable engineering purposes is made on a pole-by-pole basis. Even the statutory rate methodology recognizes variations between poles -- in terms of the number of attaching parties, the space occupied by each, and, to a certain extent, the nature of the services offered over the attachments. In short, a pole-by-pole assessment of whether nondiscriminatory access is triggered because the pole, duct, conduit or right-of-way is being used for "wire communications" is fully consistent with the Congressional intent, as embodied in the legislative history of the statute.

71/ S. Rep. No. 95-580, 95th Cong., 1st Sess. 16 (1977) (emphasis added); In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, 68 F.C.C.2d 1585, 1588 (1977).

66. The Commission's construction of the phrase "used, in whole or in part, for wire communications" leads it to an 'access to one, access to all' notion. FPL requests clarification, however, that the Commission has not found, in its First R&O, that the use of one pole for "wire communications" triggers access to ducts and conduits that are not now, and never have been, used for wire communications. To the extent the Commission has reached such a conclusion, FPL seeks reconsideration of that finding.

67. The Commission has acknowledged the unique properties and safety considerations associated with conduits and ducts,[72] in light of which, many electric utilities have declined to permit access to these facilities on a blanket, nondiscriminatory basis to any third party. Thus, the utility maintains strict control over the access and use of its infrastructure, all of which is intended to be used to carry high voltage, dangerous electric wires and related equipment. The Commission has acknowledged that "denial of access to all discriminates against none."[73] This principle must be applied on an infrastructure-specific basis.

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[72] First R&O, ¶ 1149 ("The installation and maintenance of underground facilities raise distinct safety and reliability concerns.").

[73] First R&O, ¶ 1173.

68. Finally, the Commission's conclusion that the "wire communications" used solely for internal purposes in providing electric service triggers the access requirement is unsupported by any legal authority. "Wire communications," as used in this context, clearly contemplates common carrier communications by telecommunications carriers and cable service operators -- not communications by wholly private networks. Thus, as noted above, the FCC's jurisdiction under the Pole Attachments Act is not even triggered unless the utility has designated communications space on a pole and a CATV system or telecommunications carrier uses the communications space, either alone or in conjunction with another communications entity.[74/] A utility using a private network to support its electric operations is not a communications entity. It is not considered to make or have "pole attachments" under the statute.[75/] It is not required by the statute to impute to itself the costs of "pole attachments" unless it engages in the provision of telecommunications or cable services.[76/] Thus, the use of its own infrastructure, in part, for a private communications network designed to support a safe

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[74/] S. Rep. No. 95-580, 95th Cong., 1st Sess. 16 (1977) (emphasis added); In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, 68 F.C.C.2d 1585, 1588 (1977).

[75/] "Pole attachments" are defined as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4).

[76/] 47 U.S.C. § 224(g).

and reliable electric service cannot be deemed to trigger the nondiscriminatory access provision of the 1996 Act.

V. Clarifications Are Warranted Because the Commission's Intent Is Ambiguous

A. The FCC Should Clarify that Only Reasonable Efforts to Provide Sixty Days Advance Notice of Non-Routine or Non-Emergency Modifications Are Required

69. Section 224(h) of the 1996 Act's amendments requires owners to provide written notice of an intended modification or alteration of a pole, duct, conduit or right-of-way "so that such entity may have a reasonable opportunity to add to or modify its existing attachment." In the First R&O, the FCC has established a 60-day advance notice period for non-routine and non-emergency modifications/alterations. Specifically, Rule Section 1.1403(c), as added pursuant to the First R&O, provides, in relevant part:

> A utility shall provide a cable television system operator or telecommunications carrier no less than 60 days written notice prior to...(3) any modification of facilities other than routine maintenance or modification in response to emergencies.

FPL requests that this rule be clarified/reconsidered to provide: (1) that reasonable efforts to provide 60 days advance notice of non-routine, non-emergency modifications constitute compliance; (2) that the 60-day notice is waived to the extent that such notice conflicts with the electric utility's statutory and state public service commission's obligations regarding the provision of electric service; and (3) that the sixty-day notice provision does not apply to situations where the utility pole owner is

relocating at the request of a third party, such as the state Department of Transportation, a local government or any other government entity.

70. FPL acknowledges the FCC's effort to accommodate its operations by excepting emergency and routine modifications from the notice requirement. As drafted, however, the rule is unnecessarily inflexible with regard to notice of all other modifications and, if applied, would constitute an undue hardship on FPL in many instances.

71. The FCC notes, in the First R&O, that a number of the commenting parties, including pole owners, have advocated a 60-day advance notice period.[77/] FPL emphasizes that none of the parties identified as supporting a 60-day period is an electric utility.[78/] This is so, FPL submits, because the day-to-day operations of electric utilities are different in kind from those of communications providers; electric utilities often simply cannot delay service to a customer for 60 days, though based on reasons that may not fall readily within the term "emergency."

[77/] First R&O, at ¶ 1207 and n.2973.

[78/] In their comments, the Infrastructure Owners urged a 14-day period. Comments of the Infrastructure Owners at ¶ 92.

72. A utility frequently becomes aware of the need to provide or modify service very near to the time that a customer has an expectation, or a need, to receive it. While perhaps not "emergency" in nature, a strict application of the 60-day period, such as is provided for in the rule, to such situations would at best be inconvenient and unfair to a utility's customers in many cases. It is difficult to conceive that business or residential customers in need of electric service would accept any kind of a delay in the provision of that service. Indeed, a delay of longer than a day is considered extreme in many instances. In the aggregate, any type of a delay situation has the potential to cause real damage to a utility from a business standpoint, as customer goodwill wears thin over extensive delays or interruptions in service.

73. Section 224, of course, does not specify a time frame for notice to any attaching entity, providing only that notice is to result in "a reasonable opportunity" for such entity to modify its own attachment. In providing for the emergency exception to notice requirements, the FCC has already acknowledged that whether an "opportunity" to modify is "reasonable" depends upon the circumstances associated with both the utility's and the attaching entity's modifications. In an emergency, based upon the circumstance with which the utility and others are faced, no opportunity to modify is reasonable.